

1980

The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule

Randall Bridwell

University of South Carolina School of Law

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Bridwell, Randall (1980) "The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule," *South Carolina Law Review*: Vol. 31 : Iss. 4 , Article 3.

Available at: <https://scholarcommons.sc.edu/sclr/vol31/iss4/3>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.

SOUTH CAROLINA LAW REVIEW

VOLUME 31

1980

NUMBER 4

THE SCOPE OF JUDICIAL REVIEW: A DIRGE FOR THE THEORISTS OF MAJORITY RULE?

RANDALL BRIDWELL*

We are not prepared to accept that government can become, on the grounds of "efficiency," or for any other reason, a single undifferentiated monolithic structure, nor can we assume that government can be allowed to become simply an accidental agglomeration of purely pragmatic relationships. Some broad ideas about "structure" must guide us in determining what is "desirable" organization for government.**

I. INTRODUCTION

In a time not long past, I used to read newspaper accounts of events in distant parts of the world, places I have never been and really do not begin to understand, places like Afghanistan or Iran. One thing that particularly fascinated me was the attitude expressed by the people there about the United States, and I often marvelled at how the rhetoric with which some irate Persian expressed his conception about what America really stood for seemed like platitudinous sing-song dogmatism calculated to strike some reactionary emotional nerve among the faithful, rather than embodying some intelligent, factual criticism. I used to think that perhaps these pronouncements, if they were translated correctly, provided at least a crude and fleeting glimpse into some intellectual structure thoroughly foreign to that in our portion of the western world, an insight into modes of thought and expression that turned familiar semantic, linguistic, and literary devices, like metaphor and allegory, into challenging and

* Professor of Law, University of South Carolina School of Law. A.B., Midwestern University, 1967; J.D., Southern Methodist University, 1970; LL.M., Harvard University, 1971.

** M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 10 (1967).

mysterious forms of communication. There was a certain charm, I confess, in the feeling that I was in contact with something intellectually and culturally alien. When I read about a popular Iranian magazine which declared that "[t]his Devil-like Carter must by our own hand be destroyed," and that his life should "reach a dead-end and the CIA go into the void!,"¹ I knew I was in the presence of something astoundingly unlike an American newspaper editorial, or even a placard slogan at a popular demonstration in this country. Are we really "the great devil?"² I would sometimes say to myself, "Do these people really *think* this way?" The excitable rhetorical tone, the constant and predictable appeal to the implicit rightness of particular dogma, the obsession with certain inspired goals, the complete lack of humor, the fanatical sense of mission, the measurement of all things, all people and all actions by their service to the cause, were, I thought, phenomena comparable to the dominance of religious dogma in the explanation of secular events that typified much early historiography.³ In short, I felt all this was as foreign

1. The State (Columbia, S.C.), Nov. 13, 1979, at 1 (caption to "Devil-Like Carter").

2. Wall St. J., Nov. 21, 1979, at 24, col. 3.

3. See H. BARNES, A HISTORY OF HISTORICAL WRITING 41-54 (1962). "[A]llegory and symbolism replaced candor and critical analysis as the foundations of the historical method." *Id.* at 43. Compare the principal essays found in *Symposium*, 6 HASTINGS CONST. L.Q. 403-526 (1979) with the views attributed to Father Origen (A.D. 186-255):

Whenever we meet such useless, nay impossible incidents and precepts as these we must discard literal interpretation and consider of what moral interpretation they are capable, with what higher and mysterious meaning they are fraught, what deeper truths they were intended symbolically and in allegory to shadow forth. The divine wisdom has of set purpose contrived these little traps and stumbling-blocks in order to cry halt to our slavish historical understanding of the text, by inserting in its midst sundry things that are impossible and unsuitable. The Holy Spirit so waylays us in order that we may be driven by passages which, taken in the *prima facie* sense cannot be true or useful, to search for the ulterior truth, and seek in the Scriptures which we believe to be inspired by God a meaning worthy of him.

H. BARNES, *supra* at 43-44 (quoting F. CONYBEARE, A HISTORY OF NEW TESTAMENT CRITICISM 14-15 (1910)). See also R. SOKOL, FEDERAL HABEAS CORPUS 27 (1969).

Certainly there is an argument to be made that the increased use of federal habeas corpus is one of the best indications of the vitality of the American legal system. For if it is true that it has been the vessel through which doubt has been infused into the system, this will be construed as weakness only by the weak. As long as doubt does not weaken the springs of action, it must always and everywhere be taken as a blessing. There is no other way.

Id. (footnote omitted). Whether the good served is anti-Americanism, minority protection, habeas corpus or God, the dogma of the second and third centuries has found its functional counterpart in the modern writers on American constitutional law. This essay will

as it could be to the standards of evaluation and analysis, and to the intellectual approach *we* employ in understanding and explaining our own institutions, and our own Constitution.

This oriental dream lasted until I took a close look at the writing on American constitutional law, at which time it was, like the utopia of Lord Ali-Baba,⁴ sadly dispelled. For here, amidst the nation's finest legal journals, scattered among occasional citations to judicial decisions, one can find everything from a modern legal anti-reformation, in which "transubstantiat[ion]"⁵ once again replaces the priesthood of believers, to the more mundane revelation that the "promise of America's greatness will have come much closer to fulfillment" only when we have achieved "a truly sex-neutral society."⁶ I confess with sadness and humility that this mystifies me as much as translations of Iranian news magazines. But to be a bit more serious, one finds here some similarities. One finds the nearly universal adoption of a standard of analysis applied to constitutional issues—particularly the decisions of the Supreme Court of the United States—that amounts literally to nothing more than the attempt to define the *legitimacy* of judicial action solely according to its conformity to preconceived objectives and an identification of the *fait accompli* of a modern judicial revolution as a *justification* for its occurrence. I imagine most everybody likes to see things turn out right, and we are told Americans like to have a happy ending. But I am convinced that when, "[s]ometimes it seems as if the ultimate test of a constitutional theory in our time is what effect it will have on the continuing validity of *Brown v. Board of Education*,"⁷ and when result orientation be-

explore this parallel in function and methodology.

4. H. BELLOC, *Lord Ali-Baba*, in CAUTIONARY VERSES 270 (1941).

5. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1192 (1978).

6. Kanowitz, *The ERA: The Task Ahead*, 6 HASTINGS CONST. L.Q. 637, 662 (1979).

7. R. Whitten, *The Constitutional Limitations on State-Court Jurisdiction—An Historical-Interpretative Reexamination of the Due Process and Full Faith and Credit Clauses*, Part I, at 4 (1979) (unpublished manuscript) (on file with *South Carolina Law Review*). I am deeply indebted to Professor Ralph U. Whitten of Creighton University School of Law for allowing me to read his booklength manuscript, an in-depth review of the meanings ascribed to "due process" and related concepts as well as "full faith and credit" in British law, the legal history of the American colonies of Britain, the post-revolutionary Articles of Confederation period, and the post-constitutional period up to and after the ratification of the fourteenth amendment in 1868. He has challenged many established theories, raised very serious questions about several recent Supreme Court

comes so institutionalized that prefigured results, defined in this case by some narrow segment of society, become virtually the *sole* touchstone of legitimacy, we should—we must—pause for a bit more self-criticism and self-evaluation of intellectual standards than we have as yet undergone. For in no area of legal scholarship have the techniques of the committed polemicist and the rhetorical excess of result-oriented journalism come to dominate as in the area of American constitutional law. If we feel at all moved by Trevelyan's dictum that "[d]isinterested curiosity is the life-blood of real civilization,"⁸ we may benefit by asking ourselves whether our satisfaction with results has been so great as to cause our scholarly standards to atrophy. The current debate, perhaps schism, that has emerged in the constitutional law as a result of the writing of Professor Raoul Berger is instructive. It will, I think, be useful to review the basis of the growing criticism of Berger's work to test the hypothesis that legal literature in this area has undergone an unprecedented conversion from a rather complex analytical set of criteria for the assessment of judicial action to an almost completely polemical, journalistic commitment to particular results. Initially, I must say that it is clear we are looking for a distinct trend or movement in the literature. Notions of utility and impressions about the correctness of particular results have naturally always been there,⁹ and even within this currently dominant mode of constitutional analysis the zeal of some individual convert may waver or break. But what we are examining is the *degree* to which result and policy commitments typify or dominate current thinking and set the tone in this area, and whether the current degree is compatible with the intellectual standards of scholarship.

It is certain that Berger has said a number of things with which a great many persons vigorously disagree, so the initial task will be to briefly describe what he has said and then evaluate *the reasons* why so many people say they are disturbed. I should, however, make several things clear at the start. First,

opinions, and generally illuminated the whole field of inquiry into the established limitations on judicial power. Anyone seriously interested in this subject will have to deal with the evidence he has discovered and the arguments he makes for its meaning and significance in American legal history and constitutional law.

8. G. TREVELYAN, *ENGLISH SOCIAL HISTORY* 10 (1942).

9. See Arnold, *Statutes as Judgments: The Natural Law Theory of Parliamentary Activity in Medieval England*, 126 U. PA. L. REV. 329 (1977).

although Berger has described me as “ambivalent”¹⁰ on these issues, I am not. However much I may approve of the results of *some* of the decisions of our Supreme Court, I feel that the current orthodoxy in constitutional analysis is unacceptable, in point of the reasonable standards of scholarship, and I do not mind saying so. I will elaborate more on this shortly. Second, I believe a serious recommitment to a thorough and critical articulation of the standards of legitimacy in the area of judicial authority, as opposed to an almost reflexive preoccupation with results, is a precondition to converting constitutional law scholarship in America from a footnoted journalistic battleground for ideologues into a respectable intellectual challenge.¹¹

10. Berger, *The Scope of Judicial Review: A Continuing Dialogue*, 31 S.C.L. Rev. 171, 188 (1980).

11. It is difficult to make any comments in this area without being put into one particular camp or another, and so long as the descriptive generalizations are helpful and distinguish between positions in a meaningful way, this is fine. There is, however, as the reaction to Berger's work demonstrates, an occasional tendency among those more emotionally committed to a position to rely heavily upon an *ad hominem* and pejorative approach to those who think differently. I think this reveals an inability to formulate a position of substance. See Soifer, Book Review, 67 GEO. L.J. 1281, 1281 n.3 (1979) (Berger's work categorically described as “the naive style”); Gibbons, Book Review, 31 RUTGERS L. REV. 839 (1978). In his review, Judge Gibbons, after a free-style rhetorical and polemical exercise that would do the *Saturday Evening Post* or *Time* magazine proud, ranks Berger as one with insufficient talent or knowledge to be taken seriously and delivers an off-the-cuff remark about Berger's musical abilities. Our Secretary of Health and Human Services, Patricia Harris, attributes Berger's constitutional opinion to his unspoken resentment of the progress made by minorities. Harris, *Address to the Fellows of the American Bar Foundation*, 30 S.C.L. Rev. 485, 488-90; see Bridwell, *The Federal Judiciary: America's Recently Liberated Minority*, 30 S.C.L. Rev. 467, 480 (1979). (Are we to respond that, in her heart, she resents white middle-class values?) Suffice it to say a gentlemanly (or ladylike) standard of intellectual dialogue does not prevail when the emotional commitment of the participants runs so deep, and this is unfortunate. Members of the federal bench are generally less disturbed about judicial activism than others, as one might guess, and occasionally essay to defend it. See, e.g., Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 28 (1968) (asserting judicial entitlement to legislate whenever the Court judges the legislature to be remiss or slow in performing its duties). Sometimes, however, a frank recognition of the Court's new-found role is expressed disapprovingly from the bench. Justice Robert J. Donnelly of the Supreme Court of Missouri has observed:

It is a fact that at some point in time after World War II the Supreme Court of the United States ceased to function as a court. It molded itself into an organ for control of social policy and made that policy effectual by utilization of the Fourteenth Amendment to amend the Constitution according to the predilections of the majority.

State v. Handley, 585 S.W.2d 458, 466 (Mo. 1979). A somewhat different attitude about the merits of scholarly dialogue is expressed from time to time. This attitude equates criticism with destructiveness and appears to regard a harmony of prevailing opinions as

Berger apparently never bothered to follow up on the story of the little boy who, confronted with the emperor's "new clothes," naively pointed out his nakedness. What happened to the little boy after that? Well, we now know that he spent the rest of his life defending various civil actions brought by and on behalf of the king.¹² At any rate, the guild is now against Professor Berger, and his treatment in the legal journals is the modern scholarly equivalent of a trial for heresy.

The recent symposium on his *Government by Judiciary*¹³ in the *Hastings Constitutional Law Quarterly*¹⁴ demonstrates as much, and it is instructive to examine the opinions expressed in the essays contained in it in order to appreciate just what the current controversy in this area is all about. It is quite striking to note, for example, that *all* the essays in the symposium were fundamentally opposed to Berger's views. Whether the editors chose a symposium format that arrayed every contributor against Berger, and then elicited the responses so as to heighten the impression that everyone everywhere is against him, is not clear. If any supportive contributors were invited to the party, they did not show up. Yet, in some ways, this editorially orchestrated isolation does give an accurate impression of how Berger's work has raised the hackles of academe generally. So examining the particular nature of the assorted criticism of his work is more important than a "count of noses."¹⁵

II. THE BERGER THESIS

Berger's basic thesis is that the records of the 39th Congress demonstrate a vital link between both statutory and constitutional measures for the benefit of freedmen¹⁶ and the "privileges and immunities" clause in Article IV of the United States Con-

a primary virtue. See Presser, Book Review, 22 AM. J. LEGAL HIST. 359 (1978). I cannot agree with either approach, and hope to express my opinions about the heated topic bluntly but without resort to the purely *ad hominem*.

12. Blieberg, *Emperor's New Clothes*, Barron's, June 1, 1976, at 7.

13. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977). It is this book that has triggered all the current controversy.

14. *Symposium*, *supra* note 3, at 403-635 (1979). The symposium consists of six comments on Berger's work and theories, *id.* at 403-526, and Berger's separate responses to each essay, *id.* at 527-635.

15. See Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527, 528 (1979).

16. See Bridwell, Book Review, 1978 DUKE L.J. 907, 909-11.

stitution.¹⁷ As revealed in the case of *Corfield v. Coryell*,¹⁸ this privileges and immunities clause protects in-residents of any state from statutory discriminations related to specified "fundamental rights."¹⁹ These rights consist of "(1) personal security; (2) freedom of locomotion; and (3) ownership and disposition of property."²⁰ Linking the 1866 Civil Rights Act²¹ to these enumerated rights by virtue of the frequent references in its legislative history to both *Coryell* and Article IV, Berger construes this 1866 Act to outlaw discrimination as to these fundamental rights. The privileges and immunities clause of the later-adopted fourteenth amendment extended the protection that Article IV afforded transient citizens to the newly created citizens of each state; this protected those new citizens from discrimination in matters covered by the same trinity of basic rights. Further, in formulating the basic clauses of the fourteenth amendment—the privileges and immunities clause, the equal protection clause and the due process clause—the framers intended to exclude both suffrage²² and segregation²³ from its coverage. As to these three clauses, "one revealed the scope and nature of the rights protected, the next established an equality of enjoyment as to these particular rights, and the latter guaranteed the judicial protection of these rights on an equal basis for all residents."²⁴

Therefore, these constitutional provisions not only fail to justify the creation of additional substantive constitutional rights, but they actually exclude such creation from their scope. As Berger has stated, "It is, therefore, as if the Amendment expressly stated that 'control of suffrage shall be left with the States.'"²⁵ Therefore, the landmark opinions of the United States Supreme Court in *Baker v. Carr*,²⁶ *Oregon v. Mitchell*,²⁷ and *Reynolds v. Sims*,²⁸ which brought the Supreme Court into

17. U.S. CONST. art. IV, § 2.

18. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

19. *Id.* at 551-55.

20. R. BERGER, *supra* note 13, at 21.

21. Ch. 31, 14 Stat. 27 (1866).

22. R. BERGER, *supra* note 13, at 52-68, 75-77, 93.

23. *Id.* at 119 nn.10 & 12.

24. Bridwell, *supra* note 16, at 911.

25. R. BERGER, *supra* note 13, at 7-8.

26. 369 U.S. 186 (1962).

27. 400 U.S. 112 (1970).

28. 377 U.S. 533 (1964).

the field of reapportionment, were unconstitutional, as was the desegregation opinion announced by Chief Justice Warren in *Brown v. Board of Education*.²⁹

Many of the details of Berger's reconstruction of pertinent legislative history of the fourteenth amendment have been challenged.³⁰ But this attempt to refute Berger's thesis is actually much less important than another related approach employed by his critics. For Berger's work is based on the underlying assumption that the *clearly* expressed intent of the framers of any given constitutional provision is relevant if it can be demonstrated. That is, the judicial function does not extend to revising or ignoring *clear* constitutional provisions on policy grounds.³¹ Thus, if one gets past the thorny question of interpretation and arrives at a clear meaning in a constitutional provision, Berger raises what is in fact *the* most important and basic question of constitutional law as such. The interpretation of the Constitution and the understanding of the meaning of it is really a lesser issue included in the greater issue of judicial authority. Berger states this fundamental question straightforwardly: "On traditional canons of interpretation, the intention of the framers being unmistakably expressed, that intention is as good as written into the text."³² Therefore, we confront the issue: "[G]iven a *clearly discernible* intention, may the Court construe the Amendment in undeniable contradiction of that intention?"³³

If one accepts *arguendo*, as lawyers often do, the clarity of the fourteenth amendment on these two points of segregation and suffrage, or if one picks some other arguably unambiguous constitutional provision, such as the express two-year term for Congressmen,³⁴ could the Court on policy grounds contradict the Constitution—say, for example, provide three- or four-year terms?

I have elsewhere expressed³⁵ several reservations about certain aspects of Professor Berger's work regarding which I should

29. 347 U.S. 483 (1954).

30. See, e.g., Kutler, *Raoul Berger's Fourteenth Amendment: A History or Ahistorical*, 6 HASTINGS CONST. L.Q. 511, 519-20 (1979).

31. R. BERGER, *supra* note 13, at 300-11; Berger, *supra* note 13, at 537.

32. R. BERGER, *supra* note 13, at 7 (footnote omitted).

33. Berger, *supra* note 15, at 530.

34. See *id.* at 530 (citing Kay, Book Review, 10 U. CONN. L. REV. 801, 804 (1978)).

35. E.g., Bridwell, *supra* note 16 *passim*.

offer a brief clarification. My most basic problem with his *Government by Judiciary* is the fact that I was troubled by the limited utility of the primary device for constitutional interpretation upon which Berger relied—namely the intent of the framers.³⁶ However, I was careful to note that it is “unfair to dull Mr. Berger’s accomplishments by pointing out what he did not do.”³⁷ Berger has, however, reiterated that his narrow focus in *Government by Judiciary* was to illustrate the revolutionary and improper character of *particular* judicial decisions that were contrary to the unmistakable intent of the framers of the fourteenth amendment.³⁸ On the case that Berger made against those particular decisions—I must conclude he is correct; if my comments on his approach resulted from a “misapprehension” of his “very narrow focus,”³⁹ I will gladly acknowledge the error. I feel for purposes of this essay, the constitutional problems Berger analyzes are perfectly demonstrated within this “very narrow focus” and I will attempt to deal with the issue he raises without digressing into the peripheral problems of general theories of constitutional interpretation. I do have some reservation about Berger’s use of *some* of his evidence, but as will appear later, even these misgivings are not really critical to the central, great constitutional issue he raises. One example concerns his use of statements of certain framers, such as those of Alexander Hamilton. These are, sometimes I feel, taken so much out of context that they may in fact mean exactly the opposite of what they are intended to illustrate. But the error is a common one and involves a rather technical problem of legal history. For example, Berger is fond of quoting Alexander Hamilton’s statement that the term due process of law is only “applicable to . . . proceedings of the courts of justice; they can never be referred to an act of the legislature.”⁴⁰ Berger takes this statement to mean that there can be no constraints on legislation resulting from the application of the due process guarantee of the fourteenth amendment, since Hamilton’s statement really signifies as much and exemplifies the accepted meaning that the well-settled term of art had to those

36. *Id.* at 912-16.

37. *Id.* at 916.

38. See Berger, *supra* note 10.

39. Berger, *supra* note 10, at 172.

40. Quoted in R. BERGER, *supra* note 13, at 194; Berger, *supra* note 10, at 183. See 4 THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962).

who drafted the Constitution and its fifth amendment, which contained this term. Since the fourteenth amendment referred to the same standard understanding of the term "due process," it also embodied no substantive restrictions on legislative action, at least none to which a court could resort to challenge or overturn legislation. When understood in its full context, however, Hamilton probably meant the very opposite, as I see it. I am indebted to Professor Whitten, who explored at length the background of the adoption of the due process guarantee in the fifth and fourteenth amendments and the meaning that those terms assumed in their application. As Professor Whitten points out, Hamilton's comments in the New York Senate were directed against the adoption of a statute that would have extended the disqualification for the holding of public office to include owners of vessels engaged in privateering.⁴¹ The New York Senate had just approved a declaration of rights which guaranteed that "no men shall be disenfranchised or deprived of any right, but by *due process of law*, or the judgment of his peers."⁴² Hamilton was charging that this statute, as amended, *would itself* violate the guarantee of due process of law since such a guarantee presupposed a judicial proceeding. He commented: "Are we willing then to endure the inconsistency of passing a bill of rights, and committing a *direct violation* of it in the same session? In short, are we ready to destroy its foundations at the moment they are laid?"⁴³ As Professor Whitten observed:

Hamilton's meaning in this passage is unmistakable. He first interprets "law of land" as requiring presentment and indictment, etc. Then he interprets "due process of law" as requiring a judicial proceeding before anyone can be deprived of a right. In other words, the Senate amendment depriving owners of privateers of the right to hold positions of trust within the state would violate the "Act concerning the Rights of the Citizens of this State," because it would directly deprive the shipowners of their rights without a judicial proceeding—*i.e.*, without due process of law. This is why the words "due process of law," in his view, could "never be referred to an Act of the legislature": because an act of the legislature could not satisfy

41. R. Whitten, *supra* note 7, Part II, at 34.

42. 4 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 40, at 35 (emphasis in original).

43. *Id.* at 35-36 (emphasis added).

the requirement of due process of law and was thus a violation of provisions that required due process—*i.e.*, judicial proceedings.

As a whole, the preconstitutional materials confirm the English meaning of “due process of law.” With few exceptions, the “law of the land” phrases of the state constitutions are joined with “judgment of his peers” language by the conjunction “or,” suggesting Coke’s influence. This influence is expressed in the remarks of Alexander Hamilton; and Hamilton’s statements also equate due process of law with a requirement of judicial proceedings before an individual might be deprived of his rights. Due process as a limit on the legislative power is also clear from Hamilton’s statements.⁴⁴

Now Berger’s arguably erroneous interpretation of due process of law clearly does not undercut his basic thesis, but only changes the limited meaning that the term “due process” was intended to have and requires some restrictions on legislative actions that differ greatly from the previous “substantive due process” inventions of the Supreme Court.

Similarly, when I remarked upon this different weight to be ascribed to different kinds of legislative history,⁴⁵ Berger asserted that I was being “over-refined and redundant.”⁴⁶ Actually, I was adverting to facts in the adoptive history of the fourteenth amendment that would strengthen Berger’s case, but which I feel he failed to exploit. To illustrate, assume one is at a meeting,

44. R. Whitten, *supra* note 7, Part II, at 35-36. It is certainly true that such a “due process” limitation on legislative action was not customarily resorted to in challenging the validity of a statute during a judicial proceeding. As Hamilton’s remarks strongly suggest, however, there is evidence that, as a matter of constitutional principle, such restraints or limitations were *believed* to inhere in the “due process”-type guarantee contained in many state constitutions. See *In re Dorsey*, 7 Port. 293 (Ala. 1838); *Saco v. Wentworth*, 37 Me. 165 (1853); *Regents of the Univ. of Md. v. Williams*, 9 G. & J. 365 (Md. 1838); *Parsons v. Russell*, 11 Mich. (7 Cool.) 113 (1863). That this principle was not a commonly used device for challenging legislation could in fact reflect the infrequency of any arguable violation of it by a legislative body, perhaps because the nature of the guarantee was so well understood and seriously regarded that legislative restraint in matters possibly offensive to a “law of the land” or “due process” guarantee was the norm. In any case, there is sufficient evidence to suggest that Hamilton’s remarks actually demonstrate an understanding or opinion that such restraints or legislative action would be entirely conceivable, rather than meaning that they would be impossible. If a legislature was to violate such a guarantee in the manner described by Hamilton, what remedy, one may ask, would an aggrieved party have?

45. Bridwell, *supra* note 16, at 913 n.32.

46. Berger, *supra* note 10, at 174 n.21.

say a faculty meeting, at which a particular measure is being voted on. Some colleague stands and makes comments on what he feels the measure means or will accomplish. The fact that one disagrees with the pre-adoption interpretation of it will not prevent a vote to adopt the measure since one is not absolutely bound to any given, arguably debatable construction of something subject to differing interpretations. Assume the speaker claims the term "equal protection" used in a proposed measure that would guarantee everyone "equal protection of the law" means that no one is actually guaranteed equal access to state-provided education. But contrast a situation in which this same member offers an amendment to the proposed measure that clarifies it to provide that "equal protection shall be taken to include a right to equal access to all state-financed education which no state shall abridge in any way," and the measure is soundly defeated. What may we say about these two examples of legislative history as demonstrating whether a guarantee touching the subject of education is included in the measure finally adopted that speaks only of "equal protection" generally? I would say that the explicit exclusion of specific guarantees by vote of the assembly formulating the constitutional article is worth more than one or more statements by the drafters of what it means. One or more interpretations that it *does not* mean a particular thing are to me less convincing than a vote by the adopting body that it does not. We know that the latter process occurred in connection with the fourteenth amendment.⁴⁷ Again, my comments on this score really do not detract from the critical issues to be dealt with here, but I must underscore the utility of making such distinctions in analyzing the "intent" behind any given constitutional or legislative measure.

I also feel Professor Berger has not adequately dealt with the general question of judicial authority in American legal history, which comprehends much private-law activity as well as public-law decisionmaking. For example, he seems content to approvingly cite a theory of private-law decisionmaking that is at odds with some of his basic tenets concerning the prevailing concept of judicial restraint in our early national history. He adopts the theory espoused by Morton Horwitz,⁴⁸ that "[b]y a variety of

47. Bridwell, *supra* note 16, at 913 n.32.

48. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). See

mechanisms the law was then adapted to legitimate and facilitate the inequalities of the nineteenth-century market economy in which the entrepreneurs flourished and the weak suffered.”⁴⁹ Berger also isolates a pre-eminent example of “unconstitutional” judicial action of that period⁵⁰ —the Supreme Court’s opinion in *Swift v. Tyson*⁵¹ —and lauds the Court’s belated reversal of this alleged usurpation nearly a century later⁵² to demonstrate that a lapse of time does not justify suffering an unconstitutional act to continue.

The problem is his uncritical acceptance of such a thesis when a small facet of it taken out of context appears to support his views. In many ways the Horwitz thesis contradicts Berger’s views. It relies heavily upon isolated evidence lifted out of context and selected for its compatability with a relatively subjective, motivational preconception about judicial decisionmaking, in which a massive effort to suppress the economically deprived and to support the entrepreneur becomes the central explanation for judicial action. Berger’s thesis, if I am able to correctly gener-

also R. BERGER, *supra* note 13, at 308, 321-22.

49. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979). “Nevertheless, a free and easy judicial approach to constitutional ‘adaptation’ derived in no small part from the freedom American courts assumed in the early nineteenth century to reshape the common law for the benefit of an emerging entrepreneurial system.” R. BERGER, *supra* note 13, at 321. “‘Instrumentalism’ describes the approach derived from early nineteenth century common law practice . . .” *Id.* at 322. “‘Instrumentalism,’ Horwitz shows, largely began to develop in the early nineteenth century . . .” *Id.* at 308.

Berger repeatedly employs the Horwitz approach to private-law decisionmaking, although he clearly does so to distinguish this area from questions of statutory and constitutional interpretation so as to underscore the novel nature of applying this “free-wheeling” approach to institutional interpretation in recent times. *Id.* He thus adopts the Horwitz interpretation to contrast it with what he correctly describes as the traditional approach in the public-law area, and to strengthen his argument that recent Supreme Court decisions take revolutionary liberties with the intent of the framers of constitutional provisions. My argument is that the employment of the Horwitz theory about “instrumental” private-law activity really detracts from, rather than supports, his case against extravagant judicial powers.

50. Berger, *supra* note 15, at 544-45.

51. 42 U.S. (16 Pet.) 1 (1842). Berger only states that the Supreme Court expressed the view that *Swift* was unconstitutional, and renders no opinion on the case itself or the correctness of its overruling. He thus seeks only to illustrate the former practice of overruling a decision found to be in error, despite the lapse of time. However, it is clear that Berger generally adopts the Horwitz thesis approvingly, see note 49 *supra*, and it is this that I find detrimental to his position.

52. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See R. BERGER, *supra* note 13, at 297 n.56, 410 n.11.

alize about it, posits some intellectual structure of principles, the honest pursuit of which contributes to the autonomy of the law. But Berger does not even attempt to assess whether Professor Horwitz's one-note theory actually captures the legal history of the early national period. Nor does Berger attempt to discern the degree to which such an intellectual structure sufficiently shared by lawyers and judges contributed to the vitality and neutrality of legal rules, even in the private-law area, despite social or economic forces. I feel that the Horwitz thesis, like much of the popular constitutional law literature, is calculated to support and promote a prevalent social, economic, and political bias, but will not withstand the test of time. It already has come under sharp attack,⁵³ and its "oversimplified"⁵⁴ explanation of our judicial history is a poor companion piece to Berger's radically different emphasis on constitutionalism and the rule of law as opposed to that of "caste or class."⁵⁵

The precise reasons why such a different approach to judicial authority allegedly prevailed in different legal areas should be explored. I am convinced that a close look at judicial action in the private-law area demonstrates a much more restrained approach to the formulation of new doctrine than is expressed in the "instrumentalist" cliché. The nature of restraints on judicial private-law decisionmaking would, if properly appreciated, do more to strengthen Berger's characterization of our tradition of limited judicial power than his acceptance of the popular view of extremely broad private-law powers wielded by the early nineteenth century courts. This comment, however, is designed merely to encourage a broader comparative analysis of *all* early judicial action as a predicate for evaluating the work of the modern Supreme Court; it does not detract from Berger's more limited arguments against particular decisions that they have made, and his basic thesis about the binding effect of clearly expressed intent contained in the Constitution. With these personal reser-

53. *E.g.*, Simpson, *supra* note 49. "Through an unsatisfactory and loose use of evidence, he has made a complex, confused story fall into a preordained pattern." *Id.* at 600. See also Bridwell, *Theme v. Reality in American Legal History: A Commentary on Horwitz, The Transformation of American Law, 1780-1860, and on the Common Law in America*, 53 IND. L.J. 449 (1978). "'Intellectual history' of this sort necessarily employs arbitrarily selected evidence judged by its superficial conformity to a 'theme' rather than its relationship to elements in a real context." *Id.* at 493.

54. Simpson, *supra* note 49, at 600.

55. Bridwell, *supra* note 53, at 496.

ventions aside, the central thesis of Berger's work should be addressed along with the comments of his critics.

III. THE ACADEMIC RESPONSE

Surely Berger's thesis is a proposition of constitutional law sufficiently fundamental and important to call for an answer. And the answer to Berger's basic question (can the Court contradict clearly expressed intent?) from academe has been a somewhat tentative, seldom straightforward, and mysteriously convoluted "yes." The significance of this question is quite obvious,⁵⁶ and stems from the "almost universally accepted importance of consent as a prerequisite of valid and binding rules of constitutional (or other) laws—because of the primacy of democratic theory in our constitutional scheme."⁵⁷ If it is possible to have judicial decrees supersede the most fundamental expression of consent in our system, it is vital to know *precisely* how this authority came about, why the judiciary is believed to possess it, and what conditions there are, if any, to its exercise.

On the questions of the existence of and justification for this power, the views of the majority of commentators are remarkably alike, as are the views expressed in the *Hastings* symposium. Many of the differences are clearly attributable to stylistic and rhetorical preferences rather than substance. Professor Lusky's contribution⁵⁸ is typical of the positions taken in the remainder of the essays, as well as of the "yes" answers to our seminal question in the scholarship generally. In fact, Professor Lusky's attempts to justify this form of judicial action provide an almost comprehensive litany of the rationale of pro-activist scholarship; thus, the basic features of his essay are noteworthy. Professor

56. Berger quotes Professor Philip Kurland as describing the issue as "the most immediate constitutional crisis of our present time, the usurpation of general governmental powers on the pretext that its authority derives from the Fourteenth Amendment." Berger, *supra* note 15, at 527 (quoting letter from Philip Kurland to Harvard University Press (August 15, 1977)) (letter appears, in pertinent part, on book jacket of R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977)). Professor Kurland has elsewhere described the notion that many of the values the Court imposes in the decisions actually derive from the Constitution as "arrant nonsense." Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U.L. REV. 1, 8.

57. Bridwell, *supra* note 11, at 468. See also Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 411 (1979).

58. Lusky, "Government by Judiciary": *What Price Legitimacy?*, 6 HASTINGS CONST. L.Q. 403 (1979).

Lusky's "yes" answer is constructed against the background of certain unsupported assertions about the patently "inadequate"⁵⁹ nature of a more limited form of judicial authority, and identifies the acceptance of older, "inadequate" theories with a now outmoded form of legal training.⁶⁰ Some homage is paid to democratic theory with yet another assertion that a limited view of judicial authority resting on precise constitutional content is no longer "acceptable to the American people";⁶¹ in fact, Lusky further asserts that the new constitutional revisory power enjoyed by the judiciary has been somehow harmonized with democracy since "the people at large have accepted the legitimacy of the basic decisions claiming enlarged judicial power"⁶² Yet, these observations are clearly peripheral to Lusky's basic thesis that seeks to legitimize the extensive judicial power addressed in our basic question. His primary justification is two-pronged. First, the notion that the new judicial authority is an accomplished fact resulting from judicial assertion—arising from a recent "seismic" change⁶³ in the Court's impression of its own powers—of the power to revise the Constitution and repudiation of the older limits on judicial review. The Court thus adopted a "new and grander conception of its own place in the governmental scheme."⁶⁴ In other words, the Court's claim to the power is a *fait accompli*; it is unrealistic to presume it reversible.⁶⁵ Second, and most typically and significantly, the assertion of correctness of the *results* reached by the newly claimed judicial power is tantamount to a demonstration of their legitimacy. The "practical

59. *Id.* at 403.

60. *Id.* at 405-06.

61. *Id.* at 405. Professor Lusky, however, does not share with us the important empirical research that I assume he possesses and upon which he bases his firm and precise statements about what "the people" have accepted or rejected.

62. *Id.* at 413. However, elsewhere Lusky refers to current prejudice against minorities that "most people can discern simply by examining their own attitudes." *Id.* at 422. How the Court made decisions, in fact was "driven" to make decisions, that "people at large have accepted" but which, oddly, run counter to deep-seated prejudices that have to be overridden by these judicial decisions, is quite interesting. As Professor Kurland has observed, "Many, if not most, lawyers, certainly those in academia, in government, and on the federal benches, make claims to greater insights about the social condition than even the greatest of philosophers, economists, sociologists, and political theorists." Kurland, *supra* note 56, at 5.

63. See Lusky, *supra* note 58, at 407.

64. *Id.* at 408.

65. *Id.* at 407-08. Unlike Shakespeare's Henry IV, the Supreme Court is willing to claim the throne by conquest.

effect”⁶⁶ of a more restrictive view is underscored, and “the value of the Court’s work over the last four decades”⁶⁷ is emphasized, in an attempt to demonstrate “the immensity of the stakes”⁶⁸ involved in the choice between limited and unlimited judicial review. A certain “moral authority”⁶⁹ thus enables the Court to exercise the power, and the entire thrust of this essentially pure result orientation rests upon certain *a priori* assumptions about the correctness of particular “national commitments.”⁷⁰ To be sure, Professor Lusky would declare that he is not really for “unlimited” judicial revisory power. In fact, he gently rebukes Lawrence Tribe for rationalizing the Court’s opinions in a way that really accepts all the Court’s rulings as legitimate. Yet, for all his equation of the “seismic” change in self-proclaimed judicial authority with pure physical science, calculated to drive home its inevitability,⁷¹ Professor Lusky’s “limiting” principles are purely admonitory directions to the Court to exercise “self-restraint” and to give “reasons for claiming to be the final word on constitutional questions”⁷² Those directions fail utterly to provide any meaningful or intelligible guide to either limiting judicial authority, or to answering the fundamental questions of political democracy which such authority implicates.⁷³ For all its

66. *Id.* at 410.

67. *Id.* at 413.

68. *Id.* at 432.

69. *Id.* at 433.

70. *Id.*

71. *Id.* at 406-08, 409.

72. *Id.* at 435.

73. *Id.* In his 1975 book, Professor Lusky outlined his basic thesis that the Supreme Court possesses some sort of power delegated to it by the framers to serve as some kind of ongoing constitutional convention to update the Constitution. L. LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* (1975). See Berger, *supra* note 15, at 534. Why the framers never explicitly mentioned such an important power, let alone put it in the Constitution, is itself an interesting historical question. It is all the more interesting when one considers the many well-known statements of the framers that would support the exact opposite of this awesome judicial power.

The nature of this “moral authority,” Lusky, *supra* note 58, at 433, that the Court allegedly possesses to “resolve deeply divisive conflicts,” *id.*, in our society is also interesting. It is an authority which “does not appertain to the Justices individually,” for they are “mere non-elected individuals.” *Id.* Yet, these same justices *collectively* can under Lusky’s theory, clearly revise the Constitution and discard the popular will it represents. How a collection of *individually* powerless individuals can combine to achieve this is intriguing. Constitutional law is a fascinating subject.

The inclination to rely upon merely admonitory restraints or purely personal qualities pertaining to government officials as a sufficient limitation on their authority is not

retorical nicety and for all the admitted attractiveness of some of the particular policies the Court has implemented in its controversial decisions, what Professor Lusky *actually articulates* as a test for judicial authority is nothing more than a ratification of an accomplished unilateral judicial claim to power, an acceptance of it as a real-world inevitability as inexorable as the laws of physics, coupled with a commendation of the results of judi-

new. Professor Lusky is but one example of the current advocacy of this type of constitutional limitation. Others emphasize as a more important functional restraint on power than the consent of those governed selection of who possess—what is called for scrutiny—“indisputable professional and personal merit and integrity.” Abraham, “*Equal Justice Under Law*” or “*Justice at any Cost*”? *The Judicial Role Revisited: Reflections on Government by Judiciary: The Transformation of the Fourteenth Amendment*, 6 HASTINGS CONST. L.Q. 467, 483 (1979).

Although emphasis on some hard rules deprives the Court of power to do the good deeds it desires and could do if checked only by an admonition to be restrained, to give life to the “spirit” of the Constitution, or to have “integrity,” this approach certainly was not one that figured very largely during the period in which our Constitution was drafted. For example, consider Patrick Henry’s comments to the Virginia ratifying convention:

Where are your checks in this government? Your strongholds will be in the hands of your enemies. It is on a supposition that your American governors shall be honest, that all the good qualities of this government are founded; but its defective and imperfect construction puts it in their powers to perpetuate the worst of mischiefs, should they be bad men; and, sir, would not all the world, from the eastern to the western hemisphere, blame our distracted folly in resting our rights upon the contingency of our rulers being good or bad? Show me that age and country where the rights and liberties of the people were placed on the sole chance of their rulers being good men, without a consequent loss of liberty! I say that the loss of that dearest privilege has ever followed, with absolute certainty, every such mad attempt.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 59 (J. Elliott ed. 1907). Indeed, it was these fears which, in fact, prompted the creation of the first ten amendments to the Constitution, to insure that Henry’s characterization of the government resulting from the Constitution would not prove correct. Others, too, echoed the focus on principle rather than confidence as essential to the constitutional scheme. As Jefferson observed:

[c]onfidence is everywhere the parent of despotism—free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go

17 THE WRITINGS OF THOMAS JEFFERSON 388-89 (A. Lipscomb & A. Bergh eds. 1904) [hereinafter cited as JEFFERSON WRITINGS]. No one would disagree with Professor Abraham that we should search for judges with merit and integrity. When the emphasis on his goal is coupled with statements about judicial authority that endorse the judicial *contradiction* of express intent in the Constitution, one must note that this approach is not that of our traditional constitutionalism, and fits more comfortably with the constitutional revolution of recent decades than with that of 1787-1789.

cial action. Reduced to a fundamental axiom of constitutional law, despite whatever unexpressed intent or privately held qualification Lusky might have, the "test" he *actually employs* identifies what the Court has done with what it can constitutionally do; he then declares—in an amazingly simple and straightforward manner—that "what is" is correct and accords with his impression of the historically inevitable, and should be supported because of the results it has attained. The important consideration is, however, that regardless of the soundness of Professor Lusky's hystiography (what *fait accompli* cannot be asserted to be, by definition, a product of the "pressure" of inexorable historical forces?), he fails to address the basic constitutional question of majority rule. This is a serious flaw for a theory that seeks to legitimize judicial power that is *arguendo* contrary to clear intent contained in the Constitution, and we are still left with a host of unanswered questions.

With respect to his primary result orientation, Professor Lusky's essay squarely represents the cardinal principle of legitimacy according to modern scholarly standards. These standards, more than anything, involve a basic apology for judicial action based on the acceptability of results. The *fact* of judicial authority claimed and exercised, if accompanied by laudable results,⁷⁴

74. When "the price" of legitimacy could threaten particular results, it is found to be too high. See Lusky, *supra* note 58, at 435. One of the basic flaws in Berger's work, according to Lusky, is that he does not really appreciate the "value of the Court's work over the last four decades . . .," *id.* at 413, that is, the results the Court has produced. Even here, some homage is paid to the framers with the assertion that they would really have wanted things to be the way they turned out "had they been living and acting in the middle of the 20th century." *Id.* What would these same people have wanted with respect to the protections offered by the fourth amendment, I wonder; would surmise about this question be an adequate basis for allowing warrantless *ex parte* searches for a home to fight unprecedented crime? This conjectural time-transposition theory has many possibilities. Lusky seems to envision that transmutation of the fourth amendment is possible too, if needed, arguing that

[a]t the risk of seeming needlessly alarmist I say that though they lack the numbers and military strength to mount an armed revolt, nonwhites are fully capable of creating such civil disorder that wholesale searches, arrests without probable cause, official censorship, and other police state trappings would be thought essential for societal survival here, as they were in Italy during the spring of 1978 when Aldo Moro was kidnapped and killed.

Id. If the matter is mainly a question of estimating the propensity for violence or even the political strength of contending factions in order to decide which constitutional provision to ignore, why not? Lusky here suggests so much detachment from the independent principles in the Constitution, entrusted to the judiciary for even-handed enforcement, that he regards the supposed guarantees in the Constitution as optional and dispensable

is assumed to be dispositive of the issue of legitimacy, and despite Lusky's attempts to distinguish himself from Professor Tribe,⁷⁵ his position simply results from a slightly different choice in the line-drawing process produced by purely discretionary result oriented standards, standards that simply do not elucidate the source or nature of pretended judicial authority to override clearly discernible intent. A narrative or purely descriptive account of the Court's self-perception and altered claims to authority *de facto*, and the measurement of results, are the keystones of legitimacy. A clearer invitation to judicial revision of the Constitution—hedged by admonition to be shrewd and restrained—and guided by the educated consensus of academe could not be found. However much Lusky might wish to preserve the impression that he is dealing with constitutional principles as distinguished from results, or appear to provide more than a well-written but simple apology for judicial fiat that transcends the basic issue of majoritarianism, that is not what he has done. I cannot divine his motives, but respectfully suggest *the fact* of what he has written is there for all to read, and I have described its functional qualities here with accuracy.

The remaining essays in the symposium are mainly variations on the basic apologetic theme with some deviations, both in the direction of somewhat greater restraint than the Lusky approach, and in the direction of an even more fervent commitment to result orientation and unlimited judicial authority. Professor Wallace Mendelson, for example, delivers some very blunt criticism of the activist camp and comes closer than any other symposium contributor to agreeing with Berger's construction of the fourteenth amendment; Mendelson, however, finds the meaning ascribed particularly to the privileges and immunities clause less clear than Berger.⁷⁶ Berger provides a lengthy and as-

in the face of any emergency. This is, of course, compatible with his vision of judicial authority. But one cannot help wonder whether the Constitution was designed to and should offer a bit more reliable and durable protection for the individual than it seems to be able to under the omnipotent judiciary. My personal reaction to the hypothetical threat to society posed by a minority demanding exemption from majority rule would be that the minority members would still be entitled to their constitutional guarantees—those of the fourth, the sixth, the eighth, or any other amendment, and I would reject an appeal to my hypothetical willingness to abandon some part of the Constitution later under stress, as a basis for encouraging abandonment of another part of it now.

75. *Id.* at 416-18.

76. Mendelson, *Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs.*

tute rebuttal to this position in his comments on Mendelson's paper.⁷⁷ The basic idea from our point of view is that the Berger-Mendelson conflict is over the content of the relevant constitutional provision, that is, the intent. Mendelson does not openly disagree with Berger over the effect of that intent, if it is admittedly clear and appears, at least implicitly, to resolve the majoritarian dilemma posed by unlimited judicial review the same way as Berger does. Mendelson labels "[j]udicial edicts derived from standards not discernible in statute or Constitution" as "government by judges,"⁷⁸ a form of government that he does not believe the Constitution envisioned. Professor Henry J. Abraham's contribution⁷⁹ also seems to break with the Lusky approach by recognizing that the basic issue in the debate "is not a question of judicial institutional capacity, it is rather one of judicial constitutional *legitimacy*,"⁸⁰ and by agreeing with Berger that the Court has usurped power in its recent decisions.⁸¹ Abraham agrees that the judiciary should not engage in legislation since the legislative branch "is the keystone of the arch of representative democracy,"⁸² but disappointedly concludes that as a general proposition there is no test that one can apply to draw the line between legislative and judicial action.⁸³ He then falls back upon a vague test reminiscent of Lusky's personal admonition to right-thinking judges, declares that "identifying institutional role commitments"⁸⁴ and finding "meritorious"⁸⁵ personnel to fill the courts is the answer, and dismisses rather casually the overwhelming evidence that the result orientation of modern constitutional theory has converted any test for "merits" into a purely ideological litmus with greater emphasis on "representa-

Abuse by Expansion, 6 HASTINGS CONST. L.Q. 437, 446-51 (1979).

77. Berger, *supra* note 15, at 551-58.

78. Mendelson, *supra* note 76, at 445. I will not discuss Mr. Cerny's contribution, since it concerns the reaction of the press to the proposed fourteenth amendment, rather than directly bearing on the central issue of the effect of clearly discernible intent. See generally Cerny, *Appendix to the Opinion of the Court*, 6 HASTINGS CONST. L.Q. 455 (1979).

79. Abraham, *supra* note 73.

80. *Id.* at 470 (emphasis in original).

81. *Id.* at 472-73.

82. *Id.* at 473.

83. *Id.* at 481.

84. *Id.*

85. *Id.*

tional" considerations than on competence.⁸⁶ Incredibly, Abraham proposes a test for judicial authority calling upon the "spirit" of any particular constitutional provision, and strongly suggests that invocation of this spirit can, in fact, justify judicial contradiction of express intent;⁸⁷ this is defensible in connection with the fourteenth amendment basically because, true to the fundamental credo of result orientation, to have done otherwise would "have perpetuated injustice."⁸⁸ Although Abraham decries judicial legislation on the one hand, he also apparently endorses it on the other.⁸⁹ Thus, solutions proposed by Abraham and Mendelson, like those of Lusky, make only theoretical protesta-

86. *Id.* at 485.

87. *Id.* at 478-79.

88. *Id.* at 480.

89. The issue of majority rule or consent is thus not adequately resolved. Because of Abraham's vagueness in describing the judicial role and his unwillingness to analyze and to address directly the issue of *intent vs. judicial review*, one is left with his suggestion that judicial power can transcend majority will in the pursuit of some "spirit" contained in the Constitution that is more important than specific intent. This approach is always advocated in connection with the Court's efforts to protect minorities, and the first *Brown* decision is virtually always the centerpiece of the favored, though suspect, judicial activism. *See id.* It is, however, important to note that the protection of minorities permitted or required by the Constitution is itself a product of majority decisions, and not simply some overriding "just" principle that the judiciary is charged with enforcing, without regard to whatever else the Constitution might say. At least this has been the traditional viewpoint, as it has to be, if the principle of democratic government is to continue. It is the majority itself that must be viewed as the source of minority protection against what Jefferson called "an elective despotism." 2 JEFFERSON WRITINGS, *supra* note 73, at 163. As Jefferson remarked:

All, too, will bear in mind this sacred principle, that though *the will of the majority is in all cases to prevail*, that will, to be rightful, must be reasonable, that the minority possess their equal rights, which equal laws must protect, and to violate which to would be oppression.

3 JEFFERSON WRITINGS, *supra* note 73, at 318 (emphasis added).

There are some modern commentators who approach vindication of a minority as *the* fundamental principle of constitutional law, somehow detaching the particular protection that minorities enjoy from majority will altogether. *See generally* Bridwell, *supra* note 11, at 477. If this were the fundamental principle, which of course it clearly is not, we should require both a thorough account of the origins of this cardinal principle of constitutional law and an account of how what Mr. Justice Stone called "the tyranny of minority" is any better than "elective despotism." Kurland, *supra* note 56, at 19. For these theorists, the first principle of majority rule, acknowledged as a basis for our 1789 Constitution, has been replaced (by a "seismic" change?) by the first principle of minority rule through the efforts of a judiciary whose claim to power is that it represents the latter day "surrogate" of the original drafters. *See L. LUSKY, supra* note 73, at 21.

On the various methods of vindicating some general intent or purpose from the particular phraseology of a statute or other rule, see P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 31-46 (1975).

tions and gestures toward democratic theory but as a practical matter justify judicial action by resort to some consensus about injustice; this is incompatible with majority rule, past or present. The "line" Abraham seeks to draw is figured by the same hip-shooting discretion, keyed to the academic barometer of "just and unjust" results, and is thus, *as written*, a result-selective commentary rather than an analysis of constitutional principle.

This schizophrenic attempt to equate results with legitimacy in particular instances, but to generally preserve majority rule as an option, presumably as insurance against a Court disposed to injustice, is at best a considered gamble resting on pragmatism rather than intellectually definable principle. It is a gamble that only those who are dissatisfied with majority rule, with democracy, at least on some levels, ever decide to take.

Professor Arthur Miller⁹⁰ would probably *wish* to be counted among those seeking not to "fall afoul of the democratic principle of majority rule."⁹¹ But for Miller, the Court can change the Constitution as justifiably as the people can amend it,⁹² and he criticizes Berger's view as producing "law bound and tied by *stare decisis*, whether or not well suited to contemporary needs."⁹³ He thereby implicitly passes over the fundamental matter of authority to determine "contemporary needs" by accepting the judiciary as the proper body to perform this function. The Court, according to Miller, can clearly determine "what overriding values" there are or should be,⁹⁴ and he does not attempt to hide his conviction that "the Constitution does not require that cases be decided 'in accordance with the specific intentions of the framers even when those intentions are ascertainable.'"⁹⁵ Simplistically reducing judicial decisionmaking to an election between the discernible but conflicting policies, he engages in the typical apologist's antipathy to judicial history, which offers a rich and complex intellectual structure by which to analyze and distinguish different degrees of judicial discretion

90. See generally Miller, *The Elusive Search for Values in Constitutional Interpretation*, 6 HASTINGS CONST. L.Q. 487 (1979).

91. Kurland, *supra* note 56, at 5.

92. Miller, *supra* note 90, at 488-89.

93. *Id.* at 489 n.12.

94. *Id.* at 497 (citing time-honored opinions such as *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) for support).

95. Miller, *supra* note 90, at 498 (quoting Munzer & Nickel, *Does the Constitution Mean What it Always Meant?*, 77 COLUM. L. REV. 1029, 1054 (1977)).

and authority.⁹⁶ Since judging is simply a “creative act,”⁹⁷ the Supreme Court—not to be confused with an “ordinary court of law”⁹⁸—is free to be perfectly result oriented, rather than confined to “a formula or a dogma [which] is intellectual death.”⁹⁹ Miller comes as close as anyone I have seen in embracing an undiluted, perfectly non-democratic evaluation of judicial power according to the result it promotes. He is fairly explicit about the anti-majoritarian premise that what *really* limits judicial power is what judges can get away with: “Their discretion is in fact limited to that which the public will accept.”¹⁰⁰ Ironically (but also typically), Miller in the same breath identifies the Court’s primary mission as promoting “the democratic ideal,”¹⁰¹ though in practice “judicial thought should ultimately be in terms of consequences, of results and of alternative decisions.”¹⁰² Although we have the usual exhortation to judges “not to roam at will,”¹⁰³ Professor Miller’s constituted theory, functionally and practically analyzed, espouses a judicially self-determined authority to overrule even clearly expressed popular will whenever the “authoritative faculty of social ethics,”¹⁰⁴ which our Supreme Court has become, so decides.

96. See generally R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINE OF SEPARATION OF POWERS AND FEDERALISM* (1977); Bridwell, *supra* note 53, at 461-92; Kay, Book Review, 10 CONN. L. REV. 801 (1978); Kommers, *Role of the Supreme Court*, 40 REV. OF POL. 409 (1978); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L.L. REV. 117 (1978).

97. Miller, *supra* note 90, at 498.

98. *Id.* at 499.

99. *Id.* at 501. From a purely formal point of view, Miller seems to feel that his prescription for judicial action is definitely not dogma, whereas Berger’s definitely is.

100. *Id.*

101. *Id.* at 505.

102. *Id.*

103. *Id.* at 501.

104. *Id.* at 504. It would be a challenge to redraft the original language of the 1789 Constitution to explicitly convey the meaning that writers such as Miller give to it. Perhaps doing so would dramatize the unbelievability of their occasional claims that their views are really compatible with the 1789 document. Article III would begin:

The Judicial Power of the United States should be in one supreme and “authoritative faculty of social ethics” who shall decide by majority vote “the values that should be furthered in interpreting the Constitution,” unfettered by the unmistakable will of the majority to the contrary, and shall by majority vote amend the Constitution whenever “contemporary needs” are decreed by it to so require. Nothing in Article V, herein, shall affect the Supreme Court’s power as final arbiter of all law within the United States, but any Amendment to this Constitution pursuant to Article V shall be advisory only.

At least this version of Article III has the virtue of rendering the specific content of all

Whatever cautionary remarks that Professor Miller might make as a gesture to the populace, they are nothing more than exhortations to pragmatism he gives to a supreme judicial authority whose sole function is to produce results satisfactory to him, and others of like mind. Concluding with the inevitable "ludicrously pretentious jargon common place in this camp,"¹⁰⁵ Professor Miller educates us that "[t]he Constitution is a politico-legal palimpsest,"¹⁰⁶ leaving us with the insight that nothing is ever really unconstitutional, only some things are merely unpopular.

Aside from paraphrasing the "vacuum theory" that excuses judicial action whenever "politically accountable legislators . . . abdicate their proper policy roles,"¹⁰⁷ and that apparently excuses judicial action even if contrary to the popular will when doing so would "respond to injustice," Professor Kutler's essay adds absolutely nothing to the resolution of the critical questions posed by Berger. Kutler pins expanded judicial power on changed "conceptions of the judicial role"¹⁰⁸ and closes with the same emphasis on results, adding no new elaboration to the apologist theories of the other contributors.

other constitutional provisions unimportant.

105. Bridwell, *supra* note 11, at 471.

106. Miller, *supra* note 90, at 508.

107. Kutler, *supra* note 30, at 523. Professor Kutler does give a nice account of the pre-1937 liberal chorus demanding principled decisionmaking tuned to the framers' intent and its metamorphosis to a chorus of support after the more activist era had begun. *Id.* at 511-14. Most everyone was happy with the change and was willing to accept new "conceptions of the judicial role," except some "Southern politicians molding political careers through support for segregation . . ." *Id.* at 514. Kutler orchestrates the whole development essentially as a confrontation between politically incompatible forces. Kutler's article would have been more satisfying if, without minimizing the result oriented efforts from both sides of the fence, he had reached the critical question of the source and limits of judicial authority in a democratic system, rather than delivering so many more platitudes about the "realities of governmental and social processes," *id.* at 516, the identification of ultimate limits on the judiciary as what "society tolerates in the search for new values," *id.* at 523, and the need for "sensitive appreciation of either our institutional dilemma or our political and social realities," *id.* at 526.

No one has any trouble believing that the judiciary *could* mandate a state of affairs against which the people would finally revolt, or believing that many people do not honestly ponder constitutional principle or governmental structure so much as the results they desire. But all this is really beside the point, at best, collateral to the central issue Berger addresses: how the Constitution is designed to work and how it is to be formally changed. That the Supreme Court, or "the people" for that matter, could overthrow the process that the Constitution was intended to entail does not affect how it should operate. Certainly this must be at least a *factor* in our evaluation of constitutional change.

108. *Id.* at 513.

IV. THE MAJOR PROBLEMS WITH THE NEW SCHOOL

Before elaborating on the various characteristics of the *Has-tings* essays challenging Berger's thesis, I will emphasize clearly the way in which they all involve but do not solve—save by bare assertion—the most basic constitutional problem that has emerged in the field: the manner in which the newly articulated tests to measure the limits of judicial authority are often clearly incompatible with a previously viable constitutional first principle, *i.e.*, the commitment to consent as a basis for government and to an ultimate resort to popular or majority will for law. This essential deviation from a commitment to majoritarianism, the indulgence in the luxury of “elective” or “sometime” democracy, depending on the issue, raises the most basic political and constitutional problems articulated by Berger. I should again emphasize that the results of many of the Court's actions are undoubtedly attractive. My narrow purpose here, however, is to underscore the future risks in a system of constitutional analysis which so willingly softens and euphemizes notions of constitutional principle when the tide of results is favorable. We may begin to think with Patricia Harris that results, power, and legitimacy are basically the same. Why a bad outcome in a particular case is an important “practical effect”¹⁰⁹ to be considered in

109. Lusky, *supra* note 58, at 410. An authority equally respectable has explicitly disagreed with the notion advanced by Miller that “[a]mendment is not the only way the document can be changed,” Miller, *supra* note 90, at 488, and with Professor Lusky's assertion that the value of achieving immediate goals outweighs the long-term risk of expanded judicial authority that must be conceded to achieve those goals. George Washington, for example, admonished:

If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

Washington, *Farewell Address*, in WASHINGTON'S FAREWELL ADDRESS AND WEBSTER'S BUNKER HILL ORATIONS 18 (W. Peck ed. 1918).

Professor Berger's approach has been characterized as “the naive style” by one commentator. Soifer, *supra* note 11, at 1281 n.3. Was Washington “naive” also? I am not sure I want the Supreme Court to be the modern “surrogate” empowered to perpetuate the political philosophy of naive people, assuming that the other framers were as “naive” as Washington.

Even if one accepts *arguendo* Lusky's assertion that the framers “intended” the Court to do this, is it not *at least as likely* that the framers would, had they lived in the

constitutional analysis, but a concession to selective anti-democratic judicial rule is not, is a mystery to me, save for the human inclination to perceive and respond to obvious costs and consequences more readily than remote or subtle ones. I find it hard to believe that anything other than pure result orientation can explain a collection of constitutional commentary which, in every express, articulated description of judicial power, can be applied to every litigated constitutional question to achieve results that are the exact opposite of those actually reached.

This, to me, underscores the risk in ratifying judicial over popular will. What is to happen if the Court decides in effect to eliminate the fourteenth amendment or to ratify "separate but equal" education? What can be said of the Constitution, but that the Court has undergone another "seismic" change,¹¹⁰ another "shift" in self-perception, and has achieved "a new and grander conception of its own place in the governmental scheme."¹¹¹ Indeed, what could be said of Richard Nixon, but that he did likewise. That he violated the law? But that is what Berger has to my mind proven that the Supreme Court has done, if the Constitution ranks as law. Besides, what is the law that Nixon ignored but the will of the populace, to be set aside when new inspirations overtake us? What can be said but that the representative branches of government have been "unable" or "unwilling" to act¹¹² —and with respect to some of these issues this result might in fact (rather than in academic conjecture) accord with popular will as it now stands, although not as expressed in the disputed constitutional provision. What can be said but that we have another vindication of "conventional morality"¹¹³ by the Court, and that again we have escaped the grasp of the "dead hand"¹¹⁴ of the distant, or recent past? What can be said but

twentieth century, have continued to espouse values that they explicitly praised as enduring, such as majority rule, the limited judiciary, and the sanctity of the Article V process for amendment, as opposed to embracing the exact opposite of those notions? Since "tests" for authority such as those advocated by Lusky or Miller are based upon, and in fact *require* such estimates, this is a fair question. Any fundamental "best evidence" rule to which one could resort requires an answer to it, not a mere assertion.

110. Lusky, *supra* note 58, at 407.

111. *Id.* at 408.

112. *Id.* at 417; see Kutler, *supra* note 30, at 524-25.

113. Perry, *The Abortion Funding Cases: A Comment on The Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1202 (1978).

114. Sobran, *Taking the Fourteenth*, 30 NAT'L REV. 283, 284 (1978). Of all the contributors to the symposium, Professor Miller seems the most anxious to escape this grasp.

that the "spirit" of the Constitution has prevailed over "excessive literalism"? Will adjudication to vindicate the "spirit" of a provision preclude resurrection of what *was* in fact the original intent? Will some academic counselor tell us that the "spirit" comprehends *everything but* what was intended? Perhaps it is unlikely that the Court will decide such things, but is the standard for judicial authority a mere calculation of the probabilities of judicial action? Is the limit to their authority, then, simply defined by what they can get away with? The fact that Berger has suggested such an unappealing intellectual basis for the pro-activists, and that their "tests" for judicial authority functionally approximate this standard, is probably one reason why the reaction to him seems so universal and "splenetic."¹¹⁵

To me it seems safe to say that some analytical structure that ties judicial action to "intent" or constitutional "meaning," whenever this can be ascertained, is the only way to make sense out of a democratic constitution. The overt declaration that judicial power stands above known intent is an assertion that is difficult to comprehend from the perspective of a democratic law-making process. One may, of course, counter that intent cannot be perfectly known. Let us consider this objection on several levels. This assertion cannot be taken in the extreme sense, as denying all possibility of useful communication. If you have a discussion with a friend, does the fact that you cannot tell with perfection what he means indicate that nothing is being communicated? Some common understanding, useful to both parties, obviously results. How, then, do we extract this useful core of intent from the various provisions of our Constitution? For example, when Congress proposes certain words that the states ratify, might the variations in intent among the drafters and among the states be so great that the search for intent is fictional and without purpose? It serves a purpose because without some analytical apparatus to impose limits and principles formulated in the constitution-making or amendment process upon the judiciary, even if those limits and principles are plagued by occasional ambiguities, then the democratic process certainly fails. Rather than moving within the universe of an intellectual and analytical

Yet he fails to address one of our most outstanding modern rhetorical questions, "May we thrust aside the dead hand of Earl Warren?" *Id.*

115. Berger, *supra* note 10, at 171.

dialogue, we would simply be awaiting the final decree of the judge. We would, moreover, never make progress toward more effectual and useful constitutional declarations of majority will. What difference would this effort make?

Ascertaining intent is also not really a fictional endeavor. What, then, about the opinion of a drafter or congressman who approves particular language but who assigns a different meaning to the language than that which the majority assumed? What about the small number of state legislatures that attach a different meaning to a proposed amendment that is assigned to it by the majority of the requisite number of ratifying states? Professor Ralph Whitten has addressed the problem of defining intent from the consensus rendered in the amendment process, although his entire thesis is much beyond the scope of our inquiry here. On the question of the intent properly attributed to the drafters and ratifiers of the fourteenth amendment, Professor Whitten has observed:

As we will see, however, the states took different views on due process of law as applied to particular issues, including jurisdiction. What do we conclude about the original meaning when the ratifying institutions apparently understood it in different ways? Again, the only plausible course of action is to assume the predominant understanding of the language was what the states approved. At first sight this appears unfair to the states holding the "minority view" on an issue, because their approval may have been essential to adoption and yet their view of what limits on state authority were being approved differed from that of the "majority states." For example, suppose most states saw "due process of law" as a limit upon the legislative authority as well as the judicial, while the "minority" jurisdictions viewed it as only limiting judicial power. Would it not be unfair to conclude that the phrase limited legislative authority, especially if the approval of the minority states was essential to ratification? The answer here seems, as a matter of common sense, to be that it is not unfair. Although it would be improper to allow a "special" or "secret" meaning to control the interpretation of a constitutional provision, interpreting it in accordance with the generally understood meaning among all the ratifying bodies presents no problem. As a matter of general understanding, we know that the states are usually aware when they are in the majority or minority on a certain issue. This was certainly true of the states' interpretation of the phrase "due process of law." Thus a minority jurisdiction can

hardly complain that it thought it was ratifying language whose meaning would be generally determined by the application of the minority state's "special" domestic significance. Even if, in an isolated case, a state is "deceived" about the meaning of a provision, because it looks to its own interpretation of the language rather than the general one, it cannot justly complain; for it is unreasonable for it to assume that such a special meaning will control in contravention to the accepted meaning generally. Again, this is a "common sense" approach, which individuals themselves employ in their day-to-day communications. One would hardly use a word or phrase intentionally with a "special" meaning, without explaining that meaning, if he wishes the audience to whom the communication is addressed to understand it and act properly on it. If such a "special" meaning is employed contrary to the general understanding of the words used among the audience addressed, then the communicator must expect that the audience will act, not upon that meaning, but upon their general understanding of what is being said. Similarly, if the communicator uses language in its generally accepted sense, it is not appropriate for an individual member of the audience to assume a special, personal meaning of the language and act upon it.

In the case of individual communications, as with constitutional clauses, problems of ambiguity or vagueness arise to frustrate the "intent" of speakers, writers, and framers. In individual cases, such problems can often be worked out through an interchange in which the communicator and audience arrive at an extended meaning of language that does not, on first attempt, result in the proper reference. The process of constitutional modification is, unfortunately, not this flexible. Once a constitutional provision is ratified, it is too late for its framers to protest that the language used is being generally understood in a sense different than that desired. Similarly, it is too late for the ratifying bodies, or any of them, to declare that they did not understand the words used in their generally accepted sense. Ratification has frozen the communication process, and the language must now be interpreted by the courts. The only reasonable course of action for those institutions is to attribute meaning in accord with the general significance of the language used, eliminating special meanings are not within the *legitimate* "intent" of the framers. For only in this way can the process of constitutional amendment be rendered coherent, in the sense of being predicated over the long run upon shared canons of action between framers and ratifiers. Likewise, only in this way can the process generally hope to avoid defeating the ex-

pectations of the ratifying states about the meaning of the provisions to which they are consenting.¹¹⁶

One of the most attractive features of the modern scholarship, with the motivational approach to judicial action and policy orientation, is that it is easy. The rhetorical generalities it employs are so much easier than the laborious pursuit of "intent" or "meaning," calling, as the pursuit does, on powers of analysis and painstaking historical construction of context. However, to reiterate the main point, it is the support that the new approach lends to anti-democratic forces that is one of its most troublesome characteristics. For example, this same philosophy or approach to law has carried over into a great many legal areas causing each and every legal issue to be analyzed simply as an occasion for litigational competition for a favorable judicial pronouncement that is guided only by judicial "reason" rather than majoritarian *constitutional* considerations. The vice chairman of the Equal Employment Opportunity Commission, Daniel Leach, can blithely declare that the Court's decision in *United Steelworks of America v. Weber*¹¹⁷ holding that Title VII of the Civil

116. R. Whitten, *supra* note 7, Part II, at 39-42. Professor Whitten is careful to point out that his statement that "the states are usually aware" of particular meanings assigned to terms means, of course, that the people in those states having anything to do with the issues—congressmen, lawyers, judges, and the like—are aware. What the representatives of "the people" generally understood and intended when they created and adopted a particular provision is the critical factor, since this is a representative democracy. "The American Constitution thus provides neither for a 'pure' or 'direct' democracy, nor for an 'aristocratic' or 'elitist' regime." Abraham, *supra* note 73, at 473.

Whitten's point is thus very close to if not identical to Joseph Story's opinion that "nothing but the text was adopted by the people." J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 288 (3d ed. 1858). Story, of course, explicitly rejected any notion that the Supreme Court could revise the Constitution; his position that "the policy of one age may ill suit the wishes or policy of another" militated against judicial discretion. *Id.* at 315. "Arguments drawn from impolicy or inconvenience ought here to be of no weight." *Id.*

117. 99 S. Ct. 2721 (1979). In *Weber* Justice Brennan wrote the Court's opinion applying the principal statute in question, 42 U.S.C. § 2000e-2 (1976), which makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of such individual's race, color, religion, sex or national origin," *id.* § 2000e-2(a)(1) (1976), and which prevents such discrimination in the employment process. Despite the clear language of the statute, and a background of legislative history that denies altogether the legality of such discrimination, Justice Brennan upheld a discriminatory practice adversely affecting a white employee, preferring to enforce the spirit of the Act rather than its plain meaning, holding that that spirit permitted "voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." 99 S. Ct. at 2728.

Rights Act of 1964 (forbidding employment discrimination) per-

Those who have suggested that this is a permissible judicial choice have not examined the legislative history with sufficient care; it demonstrates the only meaningful interpretation that fair-minded participants in or observers of the legislative process could have attributed to the already clear statutory language, as Senator Humphrey's explanatory memorandum on the Act demonstrated. See *A Concise Explanation of the Civil Rights Act of 1964*, 88th Cong., 2d Sess., 110 CONG. REC. 15865 (1964).

The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems *may be* established to maintain racial balance in employment. In fact, the title *prohibits preferential treatment* for any particular group. Any person, *whether or not a member of a minority group*, is permitted to file a complaint of discriminatory employment practices.

Id. at 15866 (emphasis added).

As Professor Richard Walker concludes, in the only manner honestly compatible with the language, history, general understanding, and express representations about the Act by those who sought its passage and who provided literally overwhelming evidence supporting the general understanding of its meaning: "This passage makes it quite clear that the understanding in the Senate both before and after the adoption of section 703(j), was that preferences were neither required nor permitted." Walker, *The Exorbitant Cost of Redistributing Injustice: A Critical View of United Steelworkers of America v. Weber and the Misguided Policy of Numerical Employment*, 21 B.C.L. REV. 1, — (text immediately following note 226) (publication projected for Summer 1980).

Academics, however, approach the issue from on high, and supply the necessary ambiguity when there is none, by predictably carrying us into the realm of "sensitivity" and "moral choice." See, e.g., Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. BOOKS, Dec. 20, 1979, at 37, 41-42 (1979). Professor Dworkin suggests that there simply is no procedure for a court to use in interpreting the statute "that does not require them to make a political judgment." *Id.* at 42. This may be *literally* true, but courts could "make a political judgment" that would give the statute the meaning its drafters openly sold to the public. What Dworkin demonstrates is how far afield one can go in efforts to develop some *unlikely* meaning, and that it is almost always possible to go astray if one's epistemology is sufficiently corrosive of general understanding. He has not demonstrated, however, that the Court's decision in *Weber* truly reflects congressional intent behind the statute.

It is critical to note that Dworkin seems to believe that plausible constructions drawn from the words of the statute are really our only guides. In the context of a legislative process, as opposed to a mere philosophical interpretation of text, Dworkin's belief is clearly not true, nor can it be true if the representative and democratic element in the legislative process is to prevail. Other than statutory text, the representations made about the effect of a proposed statute are the main things upon which an interested public or a legislative colleague bases an evaluation of the legality or wisdom of a proposal. Dworkin would have us believe that voluminous and explicit representations that buttress the apparent meaning of proposed language are irrelevant to the final judicial interpretation of a statute. Would we ever vote for a measure, or encourage our representatives to do so, knowing full well that some undisclosed "meaning" *contrary* both to the generally understood effect of the statute and to the explicit assurances of its proponents will emerge in the application of the statute by the courts? Dworkin's view would render legislative passage of a statute simply an uncontrollable delegation of policymaking functions to the courts. Legislation is a *process* in which the warranted meaning of statutory language plays a part in rallying support of the public and of the members of a legislative body. Properly understood, that process gives integrity and reliability to the formation of

mits discrimination in favor of blacks, is simply the "triumph of reasonableness":¹¹⁸ "Putting aside the legal thicket—the nuances and consequences—the *Weber* opinion is all about reasonableness."¹¹⁹

Leach could also casually put aside the "literal terms of this statute"¹²⁰ and emphasize its "historical background":¹²¹ fair enough except that the statute clearly would never have passed had this construction been publicly urged. (Is this more concealment of true purposes to secure passage, such as that attributed to the framers of the fourteenth amendment?)

As Professor Richard Walker has demonstrated in a penetrating article,¹²² the dynamics of institutionalized result orienta-

reasonable expectations and a degree of popular control over policymaking.

If, for example, one buys an automobile that is expressly warranted by the seller to be free of particular defects for a year, the warranty relates to what the seller meant to convey and what the buyer meant to buy. The warranty is thus essential to the resolution of a dispute over such a defect. We do not simply look at the automobile; we do not simply note that it is patently capable of mechanical failure, nor do we note that the "moral choices" open to us permit alleviating the loss either to seller or buyer, depending upon our appraisal of other factors besides the express warranty. The example is, of course, overdrawn; there must, however, be limits on the extent to which apologists for judicial legislation can have it both ways, limits beyond which the allegedly proper "moral choices" occasioned by a statute become a clear violation of the legislative process that has served to educate all involved through the discourse and representations surrounding the proposed measure. Dworkin's view permits a semantic exercise to supersede a process essential to representative government. *Post hoc* extrapolations thus replace the dynamics of representative government, so that we are finally stuck with what we *could have been told*, rather than what we were actually told. An approach that more effectively corrodes the reliability of spoken and written language could not be imagined, and yet it appears in an essay on "how to read." The modernist's sense of irony is, if nothing else, brilliant.

118. *Leach on Weber: A 'Triumph of Reasonableness'*, *Legal Times of Washington*, July 23, 1979, at 23, col. 1 [hereinafter cited as *Leach on Weber*].

119. *Id.* Leach described the efforts of Kaiser Aluminum as voluntary, but also acknowledged that "Kaiser went to a training program . . . to avoid possible difficulties with the government." *Id.*, col. 2. Since private parties per *Weber* can voluntarily establish racial quotas in hiring, "it follows inexorably that courts can order class conscious action" *Id.* at 24, col. 2. This is the "triumph of reasonableness"? This is about as "reasonable" and sensible as the current EEOC guidelines on personnel practices, pursuant to which an employer is told: "Generally it is best to require as little information from the employment application as possible." 42 *DAILY LAB. REP.* (BNA), July 30, 1979, at A-6.

120. *Leach on Weber*, *supra* note 118, at 23, col. 3 (paraphrasing words of Justice Frankfurter without source citation).

121. *Id.* Is this similar to the "spirit" invoked by Professor Abraham? See Abraham, *supra* note 73, at 478.

122. Walker, *supra* note 117. As Walker observes: "[C]areful examination of *Weber* in the context of the numerical employment policy reveals a microcosmic view of

tion and the related decline of the analytical tools essential to the integrity of the legislative process have created a truly ironic situation. The legislative branch speaks—as it did in Title VII—to the people with a clear voice and in clear language. The legislative history of the Title VII provision at issue in *Weber* reveals, even through the comments of the strongest supporters of that legislation, that a given result such as “reverse discrimination” was neither permitted nor contemplated. The contrary interpretation, incompatible with the public will, was, however, fixed by the Court and is binding upon those utilizing the Court’s opinions. What could never have been openly legislated has been given by the judiciary as an entitlement—something that Congress would have to act to undo. An attempt to undo judicially created entitlements produced by decrees that are totally detached from legislative will probably would approach in political difficulty any open attempt to pass a “reverse discrimination” statute to begin with.¹²³ A very basic dynamic in the leg-

an ominous symbiotic parasitism among the branches of government, by which they have come to feed upon the illegitimate acts of one another, appropriating them for their own unconstitutional purposes.” *Id.* at ____ (text immediately following note 8). His demonstration of the mutually beneficial usurpations of all three branches of the federal government is beyond the scope of this paper.

123. As Professor Walker’s article demonstrates, see, e.g., Walker, *supra* note 117, at ____ (text accompanying notes 220-31), the race-defined preferences now being enforced are clearly contrary to the express declaration of promoters of the statute during the enactment process, see *Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senator Joseph S. Clark and Senator Clifford P. Case, Floor Managers*, 88th Cong., 2d Sess. 110 CONG. REC. 7212 (1964). As Senator Humphrey remarked:

Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial “quota” or to achieve a certain racial balance.

That bugaboo has been brought up a dozen times, but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.

In Title VII we seek to prevent discriminatory hiring practices. We seek to give people an opportunity to be hired on the basis of merit, and to release the tremendous talents of the American people, rather than to keep their talents buried under prejudice or discrimination.

110 CONG. REC. at 6549. See also *id.* at 13078 (remarks of Senator Cooper).

There are of course other implications for the course-of-action sanction by *Weber* that are beyond the scope of this essay. For example, although literal terms of Title VII apparently forbid class or race-conscious hiring policies, the statute is interpreted to *permit* those policies if they are addressed to alleviating similar *past* actions against the race or class that is to be benefitted by the present race-conscious action. Moreover, this same

islativ process is thus reversed. Specifically, it is the dynamic that usually disfavors the promiscuous creation of new law and

interpretation encouraged but not mandated by *Weber* can permit courts to mandate the same sort of racial hiring policy if deemed to be corrective. As Leach remarked:

[T]he Act does permit class-conscious efforts to do away with the effects of discrimination. If, on their own, employers can initiate class conscious action to correct long standing patterns of discrimination without having to show that they discriminated in the past, it follows inexorably that courts can order class conscious action to correct discrimination which has been proven.

Leach on Weber, supra note 118, at 24, col. 2.

The significant thing about these measures is, of course, that the types of protection contemplated in these basic constitutional provisions—the due process and equal protection clauses—were purely individual, while the legal treatment of equality has become a class calculus, determined by one's racial, ethnic, or gender characteristics. The particular treatment of any individual is a process of bookkeeping designed to estimate the degree of past prejudice experienced by a competing but subject racial group or other "class"; this past prejudice has presumably benefitted the *now prejudiced* class though this does not seem essential. Whether one can be discriminated against is determined exclusively by reference to his racial (or other) characteristics. The irony here seems to me that the wholehearted pursuit of results, as opposed to basic principles addressed to individuals as individuals, has produced a result that would have been unacceptable to the framers of the seminal constitutional amendments speaking to equality, unacceptable to the drafters of Title VII, and unacceptable to the public. Given the acknowledged government force behind even the adoption of "voluntary" race-conscious programs, the perversion of statutory law to permit exactly this appears suspect in light of the constitutional prohibition against such government action. As Professor Kurland remarked: "There was, or should have been, little question that race was disqualified as a factor on which government could rely when imposing burdens or allotting benefits among its people." Kurland, *supra* note 56, at 12.

Kurland clearly recognized the anti-democratic element in this new approach to law, remarking:

This quota system or caste system or status system is purely a creature of the courts and the bureaucracy. It is not a social policy established through democratic expression, pursuant to which each person counts for one and none counts for more than one, but rather through those guardians of government that must be described as "politically irresponsible," i.e., without responsibility to any electoral constituency for the rules and decisions that they promulgate.

Id. at 18.

Although the particular perversions and changes of the principles that can be realistically identified with the popular will is an interesting theme, suffice it to say that this process of altering the basic concepts rooted in majority approval has naturally occurred along with rejection of that approval itself. "[W]e have quickly moved toward a concept of status measured by exactly those conditions that were once condemned by constitution and law." *Id.* at 19.

I doubt whether any honest observer would actually allege that congressional approval of Title VII was a vote to return "from contract to status," *id.* at 2, that such an effect could have ever won public approval, or that "the judicial distrust of the democratic process," which Justice Harlan Fiske Stone identified as a danger to the Constitution, *id.* at 19 (quoting A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 331 (1956)), is sufficient to impose such a measure on society, whether it likes it or not.

favors repose, disturbed only by legislative efforts addressed to some particular problem that is reversed, so that the legislature is challenged to exert its lawmaking will against the judiciary, to *undo* new nonlegislative law produced by combined court pronouncement and government force, and to *undo* constantly proliferating legal rules sometimes *based upon* but *contrary* to its own pronouncements in the same legal area. The proponents of judicial legislation—and I classify any judicial act superseding legislative will as such—have the benefit of institutional inefficiency in their struggle against the intelligent democratic settlement of issues; the legislature is relegated to the politically untenable role of confronting judicially bestowed entitlements that have superseded its own legislative pronouncements.

I do not doubt that the probable force of public will against such things as “reverse discrimination” would render impossible an attempt to democratically or legislatively achieve it as a matter of law. This probably justifies the roundabout achievement of the result in the eyes of many observers. So be it. But the way in which a consensus, regarding formulation and implementation of constitutional or legal rules, has departed from the mechanics and techniques essential to maintaining our legal system as an essentially democratic and majoritarian one should be acknowledged openly.

The “stakes” or “costs” that so consistently obsess the new apologists are nearly always calculated in the narrow terms of results to particular isolated controversies while the discourse on the institutional and political structure that figured so largely in the constitutional literature of the past has been dropped altogether. It is not altogether clear why these institutional implications involved in individual policy decisions are largely ignored. As Professor Philip Kurland observed, “[i]n part, the price is democracy itself”¹²⁴ Along with the primary political tenets of the Constitution, the particular policies reasonably identified with various constitutional provisions naturally have also been transformed, but that is another story.

Having addressed and exemplified some of the major problems with the apologists’ school, I shall now return to the principal inquiry. The focus will be upon the basic characteristics of modern pro-activist constitutional scholarship. The analy-

124. Kurland, *supra* note 56, at 20.

sis suggests the constitutional considerations that this school should more directly address.

V. CHARACTERISTICS OF THE NEW CONSTITUTIONAL LITERATURE

Several characteristics of the opinion arrayed against Professor Berger's work have clearly emerged. First, it is essentially apologetic. It justifies the Court's newly asserted extensive review powers by describing them as accomplished fact, a result of claims the Court has already made, and, which are, as irreversible as inevitable. Being essentially apologetic, this view analytically confuses a narrative explanation of a controversial judicial development with a justification for it. Mere identification of a trend is thought to validate it.

Second, criticism of Berger's work is, more than anything else, based upon an appraisal of the perceived results, or "the consequences of the Court's action,"¹²⁵ as opposed to adherence to any intelligible articulated standards that would define the limits of judicial power. Thus, apologists consistently warn of the high "stakes" that attend any deviation from result orientation, and emphasize the "value" of results the Court has produced or the parade of horrors that would occur if its power were seriously questioned. The new popular scholarly consensus, thus, largely identifies the policy debate with power, and approved results with legitimate judicial authority.

Third, the criticism is cocooned in qualifying expressions devoid of functional value or importance. These expressions are designed to preserve the impression of some theoretical limits on judicial authority, but are always, in fact, purely personal and admonitory—for example, the admonition directed to the judiciary to be restrained or "sensitive,"¹²⁶ to "respond to injustice,"¹²⁷ but only "so long as society tolerates . . ."¹²⁸ These statements do not consist of independent intelligible principles, and are virtually always accompanied by an express or strongly implied opinion that judicial will is superior to majority will. The limits on proper authority are, like the legal rules such authority advocates, personal and dependent upon the expectation that the

125. Miller, *supra* note 90, at 507.

126. Kutler, *supra* note 30, at 526.

127. *Id.* at 525.

128. *Id.* at 523.

wielders of self-defined power will be shrewdly tuned to popular opinion, as well as "restrained." What the Constitution would permit and what the Court can get away with are naturally poles apart, as they would be in any society with a generally high respect for law and legitimacy of the trust law places in its responsible guardians. In the middle ground between these two poles, vague personal admonitions that have replaced articulated principle as the substance of constitutional law has fostered a luxuriant growth of judicial power.

Fourth, Berger's critics frequently employ the assertion that democracy has at least partially failed.¹²⁹ Sometimes the failure is nothing more than unwillingness of the electorate to demand or compel particular measures attractive to critics of democratic processes.¹³⁰ In this regard the apologist school most clearly discloses its deep, underlying dissatisfaction with majoritarian principles, and its fundamentally nondemocratic character.

Fifth, the new constitutional literature is, as the foregoing characteristic suggests, basically nondemocratic. It admits of judicial action contrary to what was stated or admittedly intended by particular provisions of the Constitution. This facet of the new school generally involves expressed fear of "legislative tyranny" and "majoritarianism." It is clear, however, that our constitutional tradition has until very recently entailed protections against a tyranny of the majority; those protections have resulted from limitations accepted by the majority and, in fact, designed to curtail the power that the majority may itself exercise in the future. Today, our constitutional tradition entails no ultimate connection with any majority approval, past or present. In this last feature the new school represents a clear and dramatic break with our past constitutionalism and theory of minority protection. All of the fundamental analytical questions raised by this aspect of the new school are never addressed by it. For example, one might ask what makes the tyranny of the minority—the judiciary or those they favor—better than the tyranny of the majority? We get no answers.

Final characteristics of the views contrary to Berger's work are its historical imprecision and its utter failure to acknowledge historical evidence of theoretical refinements pertaining to judi-

129. *See id.*

130. *Id.* at 524.

cial authority. The literature is normally content to simply identify judicial action with policymaking.¹³¹ It contrasts the artificial polar characterizations of judicial action as involving *no* discretion, the usual method of describing the older view of common-law authority, or involving *all* discretion. The complex middle ground, occupied by a decisional structure that was mature by the late eighteenth century, is lost in the fog intervening between these artificial polar extremes. There were, however, intelligible theoretical standards, inevitably called for by the common-law process, designed to limit such judicial discretion. These objective standards, to which courts were held accountable, served to distinguish judicial action from legislation. That these standards were often imperfectly realized did not make their existence or the pursuit of them any less of an important historical datum, nor did it minimize the practical force these standards had in directing the decisional process away from unaccountable policymaking. The dismissive, categorical rejection of such a datum as *per se* incompatible with the Court's new post "seismic change" mentality is yet another aspect of the school's essentially apologetic character.

To the careful observer who sifts through the bulk of the modern constitutional scholarship and underscores all those statements that are functionally descriptive of what the Court is empowered to do, shorn of the imposing rhetorical trappings, it is obvious that the modern scholarship normally consists of nothing more than a declared consensus in favor of particular results.

131. See Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). "The more a rule is perceived to rest upon debatable policy choices or uncertain empirical foundations the more likely it will be seen to be common law." *Id.* at 34. See also R. BRIDWELL & R. WHITTEN, *supra* note 96.

Moreover, some assert that "the Court is a legislature," Hazard, *The Supreme Court as Legislature*, 64 CORNELL L. REV. 1 (1978), adducing ingenious historical evidence for support, *id.* at 2-8.

This equation of common law and legislative power has proved popular among the state courts. In *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969), "public policy" is described as a "molding device available to the judicial process by which changing realities and the attending manifested rules of fair play may be incorporated into our corpus juris." *Id.* at 715. If one distinguishes all the judicial techniques whereby a rule of law is determined by the collective language of a large number of related cases from the simple act of *overruling* a clearly applicable rule in a new case simply because the judiciary is now dissatisfied with the policy it represents, one finds the latter power is of relatively recent origin in Anglo-American legal systems (having previously been present in medieval jurisprudence also). See R. CROSS, *PRECEDENT IN ENGLISH LAW* 129 (3d ed. 1977).

This school's literature merely constitutes a cumbersome method of expressing approval through supportive journalism. That literature functions as the literary referendum of the legal academic community calling for judicial action, and as a polling place for the "intellectual elite" in which the options to avoid democracy are proposed and approved. Nowhere is the intellectual decline of an important facet of legal scholarship more clearly evident than in this sad fact.

VI. CONCLUSIONS

It is a shame, though it is not surprising, that someone like Art Buchwald has not stumbled upon the Supreme Court and academe in the constitutional law area. I can just imagine the cogency with which he would dramatize the foibles of their newer theories. Picture the uninitiated observer being led into the chamber of the "collective conscience" of constitutional law academe, which has become incarnate, and open to interview. The observer is ushered into his presence and told he can ask one critical and important question on judicial authority. With great deference, he asks:

Observer: "May the courts ignore the clearly discernible intentions of the framers of the Constitution and render decisions that flatly contradict it?"

Answer: (sonorously) "Do you mean *ever*?"

Observer: "Yes, may they ever do it?"

Answer: "I cannot answer without more information."

Observer: "But does not constitutional law permit, in fact require, the discussion of principles, and does not the question of whether the judiciary can do this entail a principle? The question is somewhat like can Congress pass a bill of attainder? Or can the judiciary review the constitutionality of legislation?"

Answer: "All things are not equally clear—it is a Constitution we are expounding."

Observer: "I see. Then you are not sure whether or not the judiciary can do this. Otherwise, my question could be answered 'yes' or 'no'."

Answer: "The answer to your questions is known, but I would still need more information before I can answer."

Observer: "What could possibly be needed besides the question: Can the judiciary ignore clearly expressed intent?"

Answer: (long pause) "I must . . . well . . . could you give me some idea about *what* was intended?"

The personified spirit of "con-law present" will not speak until the fix is in. If we are baffled at the "answers," we can expect the same repetitious litany of pseudo-sociological clichés designed: (1) to convince us that we are not "sensitive" enough to the contemporary constitutional milieu, and thus, cannot truly appreciate the need for sufficient flexibility to suspend these literalistic hard-and-fast rules; and (2) to show us we do not fully appreciate the "stakes" of our hypertechnical and "fossilized" approach to judicial decisionmaking. We are conditioned to feel as unrealistic and uninformed as one who would prefer Ptolemy to Copernicus. In what is one of the most incredible ironies in the whole array of academic apology, we are told that we can transcend the "analysis of the reasoning of opinions" if we read philosophers like John Rawls who can enlighten us to accept result orientation (or "the consequences of the Court's actions" as it is termed). Amazingly, one of the principal tenets of Professor Rawls' work is that one essential component of a proper, just constitution is that its essential features must be articulated before one is entitled to know where he fits into the system¹³²—the oracle must speak before the fix is in!

Berger scored the match point when the activists failed to address his questions and his overwhelming proof directly, and when the Court and most commentators failed to present anything more than pure apology, praise for results, and confusing digressions when confronted with the issues he raised. I am convinced—to give Berger his due—that the magnitude of the question he raises and the magnitude of the visible analytical defects in the response to it have been largely underestimated. We are, I think, witnessing a constitutional transformation of the first magnitude, and one that substantially alters the first principle of our past constitutionalism: an ultimate commitment to the majority will, and a genuine willingness to harmonize power with it.

There is something a bit dishonest about this new school, a certain selective blindness to the solid traditions of certain core principles of constitutionalism. There is a sense of cynical appropriation of the terminology and trappings of a majoritarian constitution, but only so far as it supports the purest form of *realpolitik*, and can soften popular antipathy to judicial action by averting blunt questions about power and authority. The per-

132. J. RAWLS, A THEORY OF JUSTICE 195-201 (1971).

sistent refusal to extrapolate from basic principles inherent in the particular positions that new school proponents find so attractive, and to apply those principles generally and hypothetically conveys to me the distastefulness of an individual who simply refuses to play in all the cards on the table. In the orchestration of the new constitutional law, the basic theme is the often metaphysical apology for what has happened¹³³ since the nineteenth century and a persistent focus on results. Around this theme one finds a heavily scored free-style section, in which participants move about as unpredictably and creatively as an Olympic figure skater or a musical soloist.¹³⁴ Excessive passion, fervent declamation, and impressive exhortation swirl in an awesome and stately cadenza of instructive eloquence. But like the figure skater, they display much motion but do not seem to be going anywhere. The basic theme is predictable enough to be boring, and the entertaining extempore performance designed to set it off begins to pall with repetition. It is then that the form of the new school becomes sufficiently obvious to illuminate its substance. The most serious aspect of this substance is quite often the absurdity, the "arrant nonsense"¹³⁵ of its basic premises.

Are we seriously expected to believe, as an asserted historical fact, that individuals who often and vigorously and explicitly

133. Some like geological metaphors, *e.g.*, Lusky, *supra* note 58, at 407 ("seismic" change), or parables based on physical science, *id.* at 409. When others really "rev up" to achieve good results, they prefer metaphors based on homeopathic medicine:

To meet a massive problem, a massive dose of law is required. Liberal judicial construction and a maximum enforcement effort are also essential. We can count on the conservative forces—political, economic, legal, and social—to protect their vital interests and thus to modify the effect of our legal formulation in the specific life situations. A broad statement of law is necessary to begin to achieve meaningful results.

Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and The Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 101-102 (1972). For a brilliant evaluation of the rise of pseudoscientific jargon in constitutional law literature, as well as some of its implications, see Nagel, Book Review, 127 U. PA. L. REV. 1174, 1177 (1979).

134. I have borrowed this metaphor from Norris Hoyt, who used it to describe the procedures followed by Panamanian public officials. Hoyt, *More Than A Voyage Between Oceans*, SAIL, Dec. 1979, at 38, 40.

Since the area of the law has institutionalized so fully the polemic and rhetorical journalistic approach, I have permitted myself a degree of journalistic license that would arguably be unhelpful or inappropriate for a subject which primarily emphasizes analysis.

135. Kurland, *supra* note 56, at 8.

declared their opposition to unrestrained judicial modification of the Constitution actually "*intended . . . to empower the Court to serve as the Founders' surrogate for the indefinite future*"?¹³⁶ Are we also to believe that implausible and strained extrapolations from *indirect* statements that they made demonstrate their *intent*, as an historical fact, to legitimize a sweeping power that they *expressly* condemned or that the "public" demands rule by judiciary and clamors for the results it brings?

The conscription of Claudius Germanicus as Emperor of the Roman Empire, in 41 A.D., was totally against his will. He reportedly declared: "I refuse to be Emperor. Long live the Republic!"¹³⁷ But Claudius' subjects literally forced him to accept. There is, in fact, no such clamor for the revolutionary judicial powers exercised by the federal courts today, despite occasional fatuous allusion in the modern apologia to "the people" or to "forces" driving the judiciary "beyond the straightforward, orthodox conception of judicial review."¹³⁸ There is just the Court and its analysts, in positions of primary and perhaps moral responsibility, respectively. The common understanding essential to the maintenance of a representatively democratic system is, like the representations of a political candidate, a trust that all silently and implicitly assume will be honored. The intellectual structure of principle represented by the bewildering array of concepts—common law, majority rule, limited authority, and the like—rests mainly upon the straightforward intellectual honesty of its custodians, whether in the courts, the bar, or the university. The willing acceptance of this intellectual trust by individuals has enabled them to perpetuate some of society's most valuable ideals, and hold them, however feebly, above the temptations of the moment, and occasionally above the "transient benefit"¹³⁹ of attractive results that abandonment of the ideals might facilitate. These ideals are autonomous and are useful only within this intellectual trust; they are, thus, principles capable of being passed on over time—inheritable, as opposed to results, which are not.

Just what has made the abandonment of the first principle

136. L. LUSKY, *supra* note 73, at 21.

137. R. GRAVES, I, *CLAUDIUS* 492 (1934).

138. Lusky, *supra* note 58, at 409.

139. Washington, *supra* note 109, at 18.

of the Republic so painless among the constitutional law academy is hard to say, and why this abandonment is not counted as part of the "costs" or "stakes" in the long-term constitutional balance sheet is disturbing. Perhaps the saga of Claudius can give us a final bit of instruction on the point. Claudius saw at least one bright spot in the imperial role that was thrust upon him, and it perhaps suggests the silver lining for academe as well: "So, I'm Emperor, am I? What nonsense! But at least I'll be able to make people read my books now."¹⁴⁰

o

140. R. GRAVES, *supra* note 137, at 494.